STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Focal Communications Corporation of Illinois	)	
	)	00-0027
Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois.	)	

BRIEF ON EXCEPTIONS OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

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April 10, 2000

The Staff of the Illinois Commerce Commission ("the Staff"), by and through its counsel, and pursuant to Section 200.830 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.830) and Section 761.430 of the Arbitration Practice Rules for Telephone Utilities (83 Ill. Admin. Code 761.430), respectfully submits its Exceptions to the hearing Examiners' Proposed Order (hereafter "HEPO"), and Brief on Exceptions in the above-captioned matter.

First Exception - Tandem Functionality Test - Issue Two

The second issue in dispute is whether Focal should be permitted to charge Ameritech the tandem rate for local calls (i.e. non-Internet Service Provider bound calls) terminated on Focal's network. Resolution of this issue requires that the Commission determine whether Focal's switch serves a geographic area comparable to the area served by Ameritech's tandem switches (geographic comparability test), and, arguably, whether Focal's switch performs the same functions that are performed by Ameritech's tandem switches (functionality test).

The HEPO concludes that "a fair reading of the relevant portions of the First Report and Order leads to the ineluctable conclusion that the functionality test has application only where a state commission is desirous of setting disparate reciprocal compensation rates for the transport and termination of traffic depending upon whether the traffic is terminated to an end office switch or a tandem switch. Because that issue is not before us, the functionality test is moot." HEPO at 7. The HEPO then concludes that Focal, having met the geographic comparability test, is entitled to be compensated for the cost of from Ameritech customers at Ameritech's tandem rate of $0.005175 per minute. Id.

The Staff concurs in the conclusion reached in the HEPO that Focal is entitled to be compensated for transporting and terminating local calls originating from Ameritech customers at Ameritech's tandem rate of $0.005175 per minute. However, this is because Focal has met both the geographic comparability and functionality tests, as the Staff submits it is required by law to do.

Contrary to the HEPO's finding, a "fair reading" of the Local Competition Order does not by any means lead to the inevitable or unavoidable conclusion that the functionality test applies only in the limited circumstances indicated. However, since this arbitration presents such a circumstance, the functionality test applies anyway.

Paragraph 1089 of the Local Competition Order provides, in its entirety, that:

> Given the advantages of symmetrical rates, we direct states to establish presumptive symmetrical rates based on the incumbent LEC's costs for transport and termination of traffic when arbitrating disputes under section 252(d)(2) and in reviewing BOC statements of generally available terms and conditions. If a competing local service provider believes that its cost will be greater than that of the incumbent LEC for transport and termination, then it must submit a forward-looking economic cost study to rebut this presumptive symmetrical rate. In that case, we direct state commissions, when arbitrating interconnection arrangements, to depart from symmetrical rates only if they find that the costs of efficiently configured and operated systems are not symmetrical and justify a different compensation rate. In doing so, however, state commissions must give full and fair effect to the economic costing methodology we set forth in this order, and create a factual record, including the cost study, sufficient for purposes of review after notice and opportunity for the affected parties to participate. In the absence of such a cost study justifying a departure from the presumption of symmetrical compensation, reciprocal compensation for the transport and termination of traffic shall be based on the incumbent local exchange carrier's cost studies.

Paragraph 1090 of the Local Competition Order provides, in its entirety, that:

> We find that the "additional costs" incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch. In such event, states shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate.

It is difficult to see why the functionality test is, as the HEPO describes it, "moot" in this case. *See* HEPO at 7. In fact, the Commission has applied the functionality test in the past. *See* Teleport Communications Group, Inc. - Petition for Arbitration, ICC Docket No. 96-AB-001 (1996) ("States are also instructed [by the Local Competition Order] to consider whether new technologies ... perform functions similar to those performed by an incumbent LEC's tandem switch."). There is no reason to depart from this here.

Accordingly, the Staff recommends the following alterations to the HEPO:

> The Commission concludes that ~~a fair reading of the relevant portions of the First Report and Order leads to the ineluctable conclusion that the functionality test has application only where a state commission is desirous of setting disparate reciprocal compensation rates for the transport and termination of traffic depending upon whether the traffic is terminated to an end office switch or a tandem switch. Because that issue is not before us, the functionality test is moot.~~ both the geographic comparability and functionality tests must be met before Focal can qualify for the tandem rate. ~~In terms of satisfying the geographic test, the~~ The overwhelming evidence is that Focal is able to and is serving customers throughout the relevant geographic area, and that its system functions in a manner substantially similar to Ameritech's tandem switches. Accordingly, ~~and~~ Focal is entitled to be compensated for the additional costs of terminating local calls from Ameritech customers at Ameritech's tandem rate of $0.005175 per minute.

HEPO at 6

<u>Second Exception - Rate of Intercarrier Compensation for ISP Traffic - Issue Two</u>

With respect to intercarrier compensation for ISP traffic, the HEPO provides that:

> The Commission concludes that Focal should receive reciprocal compensation for ISP bound calls at the Ameritech tandem rate of $0.005175 per minute of use. There is not a shred of evidence in this docket that, functionally, ISP bound calls differ in any manner from any local call. While the FCC has muddied the waters considerably in this area as it tries to maintain jurisdiction of the issue, the undisputed fact remains that a call to an ISP is a call from one local usage customer to another local usage customer, in other words, a call utilizing telephone exchange service, subject to state commission jurisdiction and the payment of reciprocal compensation to the terminating carrier under Section 251(b)(5) of the Act. Ameritech's arguments boil down to two predicates. ISPs should be paying access charges to ILECs when they transmit calls to distant web sites. This is a matter for the FCC. The second argument is current rates do not reflect reality because the widespread use of the internet has undermined many of the assumptions (especially the impact of hold times on the set up cost components of those rates) that went into setting those rates in the first place. While that may be true, Ameritech is well versed in the manner in which it may seek to redress rates that are not just and reasonable, and it may be expected to follow those avenues as conditions warrant. This does not change the ultimate fact one iota. Calls to the Internet are, from a functional and technical perspective, indistinguishable from the entire universe of local calls and should be treated as such for purposes of establishing appropriate levels of reciprocal compensation.
>
> While the Commission appreciates Staff's attempt to forge a compromise in this matter, we conclude that its proposal, which would require the segregation and tracking of ISP bound traffic by the combined efforts of Ameritech and Focal, is basically unworkable. While Staff was of the opinion that such a process could work, the unequivocal evidence is that Focal is unable to identify ISP bound calls separately from any other call.
>
> HEPO at 11

This finding is incorrect in several ways. First, the record contains much more than "a shred of evidence" to the effect that calls to ISPs are functionally different than calls to voice users. *See, e.g.*, Staff Exhibit No. 2.0 at 11, 18 (Focal ISP customers are, in many cases collocated in Focal's end office); Focal Exhibit No. 2.0 at 52 (ISP customers generally require more sophisticated technology than voice customers); Focal Exhibit No. 2.1 at 11, 19 (many Focal ISP customers collocated, different technology used). Second, the finding ignores the jurisdictional and cost-based differences between voice and ISP traffic. The record is replete with evidence for both of these propositions.

There are excellent reasons here to carefully consider the FCC's determinations concerning the nature of ISP bound traffic and the proper jurisdictional classification of this traffic. First, the D.C. Circuit, as the Staff pointed out in its Initial Brief in this matter, did not repudiate the FCC's conclusion that Internet-bound traffic was jurisdictionally interstate; rather, it merely called into question the propriety of the analytical tool (end-to-end analysis of the call) that the FCC used to make the determination. Bell Atlantic Telephone Cos. v. FCC, No. 99-1094 (D.C. Cir., March 24, 2000) (slip opinion at 9). Indeed, the D.C. Circuit stated that the FCC should (and, therefore, presumably could) demonstrate why the end-to-end analysis is appropriate. Id. at 11. Also, as the Staff has likewise noted, the D.C. Circuit made it clear that, whatever the similarities might be between local voice traffic and ISP traffic, there were also significant differences; it accordingly declined to characterize the traffic as either local or long-distance. Id. at 8, 15. The HEPO's assertion that "the undisputed fact remains that a call to an ISP is a call from one local usage customer to another local usage customer, in other words, a call utilizing telephone exchange service, subject to state commission jurisdiction and the payment of reciprocal compensation to terminating carrier under Section 251 (b) (5) of the Act[,]" simply is incorrect. This is neither a fact nor "undisputed". Indeed, prior to the D.C Circuit opinion, such a call to an ISP was categorically not a local call and was not subject to state commission jurisdiction and not subject to the payment of reciprocal compensation. [1] It is quite possible, if not likely, that upon remand that again will be the case legally. Regardless of that ultimate outcome, as already noted, the D.C. Circuit has concluded these calls are distinguishable from local calling. Moreover, there seems to be no dispute whatever that there are cost differences between voice and ISP calls. *See, e.g.,* Staff Exhibit No. 2.0 at 11, Focal Exhibit No. 2.1 at 17, Ameritech Exhibit No. 2.0 at 14.

In consequence, the record is clear: there are non-trivial functional and technical differences between the types of traffic at issue, and significant jurisdictional and cost differences. The HEPO ignores all of these.

Likewise, the HEPO's reasoning would allow for certain results that are unsound. It is, as has been noted, clear that a significant percentage of Focal's ISP customers are collocated at Focal's offices. However, the HEPO's main premise (that ISP and voice traffic are "functionally equivalent") dictates that a CLEC like Focal, with numerous collocated ISPs would be treated identically, for purposes of reciprocal compensation, to a CLEC serving no ISP customers but rather serving, for example, a geographically widely dispersed base of residential voice customers. The HEPO would apply the same rate of compensation for terminating traffic in these instances, a result which ignores obvious real and significant functional and cost differences. Contrary to

[1] The Staff believes that some state commissions have determined reciprocal compensation payments should not be applied to ISP-bound traffic originated by one carrier and delivered by another.

the HEPO's findings, a CLEC delivering much of the traffic received from another carrier to ISP customers is not entitled to the same level of compensation as a CLEC delivering much or all of such traffic to residential voice customers as the HEPO rules. The objective is to identify (in the absence of knowledge about the specific levels of a CLEC's costs of transport and termination) the best proxy for those costs. The HEPO fails to consider the pertinent evidence that should be utilized in pursuit of that objective. It, moreover, encourages CLECs to serve customers such as ISPs, who are likely to accept a great many convergent, inbound calls, rather than, for example, residential or small business voice customers, which typically will involve higher per call costs. Finally, the HEPO finds elsewhere that "Focal should not be allowed to count ISP bound traffic as local exchange service in self certifying that it will be providing a significant level of local exchange service through an EEL. " HEPO at 13. The HEPO's rationale for this is that "the FCC, for whatever reason, has tied the LEC's obligation to unbundle a special access circuit to the CLEC's obligation to provide significant amounts of local exchange service to a particular customer." Id. The HEPO goes on to observe that "[t]he FCC, through a number of proceedings, has specifically held that ISP bound traffic is not local exchange traffic." Id.

Thus, the HEPO accepts the FCC's assertion of jurisdiction for one purpose, but not for another, while, apparently, finding both equally questionable This is fundamentally inconsistent logically.

Finally, the HEPO finds that "Focal is unable to identify ISP bound calls separately from any other call." HEPO at 11. This is, of course, what Focal might be expected to assert, but it is not, strictly, correct. There is nothing in the record to contradict the proposition that reasonably accurate estimates (admittedly not to100% accuracy) can be obtained readily. The HEPO ignores the fundamental fact that use of Ameritech's costs as proxies for Focal's costs itself involves estimates that, by definition, are not 100% accurate in assessing Focal's costs, as Focal itself concedes. Insisting upon 100% accuracy in identification of ISP bound traffic, as the HEPO apparently does, to justify the application of an unjustified rate to ISP bound traffic is clearly not a reasonable solution. It will result in systematic overcompensation for Focal relative to the costs it incurs in delivering this traffic. The better course, fully justified by the record, is to put in place the most reasonable system to identify and measure ISP bound traffic, and apply Staff's adjusted end office rate to that traffic. The measurement process can be devised to err on the side of caution, so that any systematic error would underreport ISP bound traffic as a percentage of the total traffic terminated by Focal for Ameritech.

Accordingly, the Staff recommends the following alterations to the HEPO:

> The Commission concludes that Focal should receive reciprocal compensation for ISP bound calls at the Ameritech ~~tandem~~ adjusted end-office rate of ~~$0.005175~~ $0.001333 per minute of use. ~~There is not a shred of evidence in this docket that, functionally,~~ The record reflects that ISP bound calls differ ~~in any manner~~ from ~~any~~ local calls functionally, jurisdictionally, and based upon cost. The D.C. Circuit recognized the significant differences in the two types of traffic in its recent *vacatur* of the FCC's Declaratory Ruling. Accordingly, requiring Ameritech to pay Focal the full tandem rate would result in overcompensation, and incentives to serve collocated ISP customers at the expense of others. However, Focal does incur costs in terminating calls to ISPs, and should be compensated for this. The Staff's proposed adjusted end-office rate, which recognizes that Focal's switch does not function as a tandem in this context, is the appropriate rate of intercarrier compensation, based upon the record. ~~While the FCC has muddied the waters considerably in this area as it tries to maintain jurisdiction of the issue, the undisputed fact remains that a call to an ISP is a call from one local usage customer to another local usage customer, in other words, a call utilizing telephone exchange service, subject to~~

~~state commission jurisdiction and the payment of reciprocal compensation to the terminating carrier under Section 251(b)(5) of the Act. Ameritech's arguments boil down to two predicates. ISPs should be paying access charges to ILECs when they transmit calls to distant web sites. This is a matter for the FCC. The second argument is current rates do not reflect reality because the widespread use of the internet has undermined many of the assumptions (especially the impact of hold times on the set up cost components of those rates) that went into setting those rates in the first place. While that may be true, Ameritech is well versed in the manner in which it may seek to redress rates that are not just and reasonable, and it may be expected to follow those avenues as conditions warrant. This does not change the ultimate fact one iota. Calls to the Internet are, from a functional and technical perspective, indistinguishable from the entire universe of local calls and should be treated as such for purposes of establishing appropriate levels of reciprocal compensation~~. Moreover, it appears that Focal can despite its protestations to the contrary, segregate voice and ISP traffic. In consequence, the Staff's recommendation can be implemented.

~~While the Commission appreciates Staff's attempt to forge a compromise in this matter, we conclude that its proposal, which would require the segregation and tracking of ISP bound traffic by the combined efforts of Ameritech and Focal, is basically unworkable. While Staff was of the opinion that such a process could work, the unequivocal evidence is that Focal is unable to identify ISP bound calls separately from any other call.~~

WHEREFORE , the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

Respectfully Submitted,

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April 10, 2000

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NOTICE OF FILING

PLEASE TAKE NOTICE that we have on this 10th day of April, 2000, filed with the Chief Clerk of the Illinois Commerce Commission, 527 East Capitol Avenue, Springfield, Illinois, the Brief on Exceptions of the Staff of the Illinois Commerce Commission, a copy of which is hereby served upon you.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the above Notice, together with copies of the document referred to therein, have been served upon the parties to whom the Notice is directed by mail, proper postage prepaid or by facsimile from Chicago, Illinois on the 10th day of April, 2000.

Matthew L. Harvey

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